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## The Threat of Article 23 to Civil Liberties in the Hong Kong Special Administrative Region

by Inbal Sansani\*

On February 26, 2003, the government of the Hong Kong Special Administrative Region (HKSAR or Hong Kong) of the People's Republic of China formally introduced a preliminary draft of a controversial new national security bill to Hong Kong's legislature. Opponents of the proposed legislation, including pro-democracy camps within the Legislative Council, Hong Kong's legislative body, as well as local civil and human rights groups, fear that China could use the new laws to suppress certain fundamental rights and freedoms. Despite efforts to curtail dilution of the national security measures proposed in the original draft, following a three-month public consultation period and a series of domestic and international protests, the bill still poses a serious threat to civil liberties in the HKSAR.

### Background

The HKSAR, located on the southeastern coast of China, consists of Hong Kong Island, the Kowloon Peninsula, and the New Territories. The area constituting Hong Kong proper consists of 236 islands and part of the Chinese mainland. On July 1, 1997, China reclaimed Hong Kong, a territory that its last feudal regime, the Qing Dynasty, ceded to Great Britain at the end of the Opium War in the mid-1800s. The convergence of two nations with a similar ethnic makeup but radically different political and economic systems has been the subject of consistent international scrutiny.

The 1984 Sino-British Joint Declaration on the Future of Hong Kong (Joint Declaration) insured that Hong Kong's 1997 reversion to Chinese control after 155 years of British colonial rule would not undermine its success as a major trading, manufacturing, and industrial partner. The Joint Declaration provides that Hong Kong will retain, for 50 years, the same legal and economic systems, rights and freedoms, and basic way of life that existed therein before the handover of sovereignty. The treaty binds China to allow the people of Hong Kong a high degree of autonomy—except in matters of defense and foreign affairs—under the twin dicta of “One Country, Two Systems,” China's policy, stemming from former president Deng XiaoPing's approach to the reincorporation of the Hong Kong lands and governmental system under the umbrella of the People's Republic of China, with the goal of maintaining the status quo in this region.

In 1990, China's legislature, the National People's Congress, approved the Basic Law of the HKSAR, which entered into force with the 1997 change of sovereignty. It serves as Hong Kong's “mini constitution,” ensuring the implementation of the basic policies contained in the Joint Declaration. Subject only to China's constitution, the Basic Law is the supreme law of Hong Kong and functions as the territory's principal constitutional instrument. The Basic Law protects individual rights and freedoms in two limited ways: (1) it lists specific rights enjoyed by Hong Kong citizens; and (2) it expressly incorporates the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR), and international labor conventions. Article 39 of the Basic Law provides this safeguard: “The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law” of the HKSAR.



Credit: Epoch USA, Inc.

*The National Security Statute drafted pursuant to the requirements of Article 23 of the Basic Law was submitted on March 1, 2003 to the Legislative Council for first and second readings, and has passed. More than 20 council members from the Democratic Party, the Civil Human Rights Front, and the Employee Union left the meeting before the first reading to show their opposition. They burned a symbolic copy of the Blue Bill (the current stage in the legislative process for Article 23) in the parking lot outside the Legislative Council building.*

### **The Chinese Government's Introduction of Article 23 into the Basic Law**

After a million Hong Kong people demonstrated locally in support of the pro-democracy movement at Beijing's Tiananmen Square in June 1989, China added Article 23 to Hong Kong's Basic Law. Article 23 requires that the HKSAR “enact laws on its own to prohibit any act of treason, secession, sedition, and subversion against the Central People's Government,” addressing issues of state secrets and the activities of foreign political organizations in Hong Kong. Rather than directly prohibiting treason, sedition, and subversion, or precisely defining these crimes, Article 23 mandates that the HKSAR enact laws to define and penalize such actions. Although acts constituting the crimes delineated in Article 23 have not been an issue in the HKSAR to date, the Hong Kong government is nevertheless required to implement laws to address these crimes under Article 23.

The Chinese government seems to have introduced Article 23, at least in part, to avoid future anti-Chinese demonstrations by the people of Hong Kong. Although the original 1988 draft of Article 23 merely requested that Hong Kong enact laws by February 1989 against “any act designed to undermine national unity or subvert the Central People's Government,” the draft of Article 23 had evolved to include both concepts familiar to Hong Kong's common law system and the constitutional requirement to implement national security legislation—laws that “prohibit any act of treason,

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secession, sedition, or theft of state secrets.” The final draft of Article 23, published in April 1990, nonetheless, stipulates that the HKSAR “enact laws on its own to prohibit any act of treason, secession, sedition, and subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

Due to China’s generally dismal human rights record, specifically the June 1989 Tiananmen Square massacre and the subsequent promulgation of Article 23, the Hong Kong government enacted the Bill of Rights Ordinance in 1991. The Bill of Rights compensates for inadequacies in the Basic Law’s enumeration of individual rights by providing many additional rights and freedoms for Hong Kong residents. The Bill of Rights reiterates almost verbatim the provisions of the ICCPR, thereby making those enumerated rights directly applicable to the citizens of Hong Kong. The Bill of Rights combines with the Joint Declaration and the Basic Law to ensure that the provisions of the ICCPR remain in force after the 1997 handover and are implemented through Hong Kong domestic law.

#### The HKSAR’s Proposals regarding the Implementation of Article 23

On September 24, 2002, the government of the HKSAR published the Consultation Document on Proposals to Implement Article 23 of the Basic Law (Consultation Document). Although having the actual power to implement Article 23 is an important aspect of the HKSAR’s autonomy, concern over the necessity to implement Article 23 has plagued Hong Kong since the Basic Law came into effect in July 1997 with the end of British colonial rule. A three-month consultation period with local NGOs and the general public followed the Consultation Document’s introduction, after which the Hong Kong government explained in a press release that it had carefully considered each submission. Secretary for Security Regina Ip Lau Suk-Yee said that the submissions were classified into four categories, including: (1) submissions from organizations; (2) submissions from individuals; (3) submissions in the form of standard letters and pre-printed opinion forms; and (4) signature forms.

Together with the subsequent legislative work, most notably the introduction of draft bills to the Legislative Council scheduled to occur between January and July 2003, the implementation of Article 23 represents one of the most important constitutional developments in the HKSAR since its establishment more than five years ago. Indeed, the implementation of Article 23 is a major test of whether the concept of “One Country, Two Systems” enshrined in the Basic Law can be executed in a way that strikes a proper balance between Beijing’s directives and the status of civil liberties enjoyed by the population of the HKSAR.

#### Criticisms of the HKSAR’s Proposals to Implement Article 23

Although for five years the government of the HKSAR avoided the inevitable controversy that would surround the introduction of legislation implementing Article 23, increas-

ing pressure from Beijing and the HKSAR’s legal obligation to implement legislation caused the government to move forward with the Consultation Document. Critics of the government’s approach to implementing Article 23 legislation claim that the consultation exercise is incomplete in that the Consultation Document outlines the government’s broad policy and intentions in a lengthy document to which specific responses are difficult to formulate. Opponents criticize the glaring ambiguities in the Consultation Document and argue that in the context of treason, secession, sedition, subversion, theft of state secrets, and increased police powers, the smallest errors in legal drafting or in the legal definitions provided by the new laws can easily have draconian consequences.

The government explains that implementing Article 23 would not compromise either the region’s liberal features or laissez-faire economy. It argues that since Britain, Canada, and the United States have legislation similar to Article 23, then Hong Kong, as a part of China, should also have it. Opponents to the implementation of a broad Article 23 argue that the aforementioned countries balance comparable legislation with democratic attributes including, *inter alia*, regular elections, a vibrant civil society, and a powerful, free press, each of which Hong Kong lacks. In theory, therefore, any arbitrary application of anti-secession or subversion laws in those countries would be subject to plausible counter-pressures by one or all of the available democratic elements. Additionally, the Hong Kong chapter of Amnesty International posits the inclusion of sedition as an example of the excessive proposals to implement Article 23.

The organization claims that according to current legal thought, sedition laws are archaic and unprincipled and are no longer used in the majority of countries that have retained sedition laws.

#### The Scope of the Original Proposals to Implement Article 23

Although the government of the HKSAR is obligated to implement Article 23, domestic and international human and civil rights organizations are concerned with the scope of the provisions as outlined in the Consultation Document. The Consultation Document stemmed from existing Hong Kong law as set out in the Crimes Ordinance (covering, *inter alia*, treason and sedition), the Societies Ordinance (addressing activities of foreign political bodies in Hong Kong), the Emergency Regulations Ordinance, and the Official Secrets Ordinance. The Consultation Document included chapters on treason, secession, sedition, subversion, theft of state secrets, foreign political organizations, investigation powers, and procedural matters. Although Article 23 recognized that “the manner in which the state’s sovereignty and security are protected in the Mainland and in the HKSAR may legitimately differ,” the breadth and ambiguity of the proposals drew significant international attention.

Another far-reaching example of the proposals to implement Article 23 can be found in the Hong Kong government’s addition of a new mechanism for banning any organization “affiliated with a Mainland organization which has been proscribed in the Mainland by the Central Authorities, in accordance with national law on the ground that it endangers national security.” The Hong Kong Human Rights

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Monitor (HKHRM) labeled this proposal “sinister,” because Article 23 does not reference links between organizations in the HKSAR and mainland organizations. The HKHRM was suspicious of the Hong Kong government’s inclusion of a proposed restriction that the promulgation of Article 23 does not require.

A proposal to ban organizations on security grounds based on a link with the Chinese mainland had the potential to permit the Chinese government to ban any organization of which Beijing disapproves. In addition, any branch of an organization banned by China for state security reasons could be banned in the HKSAR at any time, and the Hong Kong government was not even required to conduct any independent investigation. This provision would have effectively made the laws of the Chinese mainland applicable in the HKSAR.

According to the February 2003 draft law, any group of two or more persons, regardless of location, will be considered a “Mainland organization” if the group was formed or established on the Mainland or its main place of business is in the mainland. Further, a Hong Kong group is considered “subordinate” to a “Mainland organization” if any of its policies are determined, directly or indirectly, by the “Mainland organization.”

A main complaint of Hong Kong NGOs is that many of the offenses outlined in the Consultation Document are adequately covered by existing legislation, since Hong Kong’s current laws already contain considerable regulations on the seven crimes prohibited in Article 23. Therefore, most members of Hong Kong’s legal and administrative communities maintain that another anti-subversion law is unnecessary. The Hong Kong government insists on passing the law, however, although the suggested definitions of the crimes are ambiguous and could potentially create avenues for abuse.

Another major criticism of the HKSAR’s proposals is that the concepts of government and country are confused and used interchangeably in the proposed document. In a democratic country, citizens are empowered to monitor and check the government, whereas the proposed enactment of Article 23 equates opposing the government with opposing the country. In addition, speech deemed provocative may be regarded as illegal in oral, written, and electronic forms. People who express or hear such speech and fail to report it would be regarded as complicit in the crime. Finally, the law extends to Hong Kong permanent residents, regardless of their current residence, as well as to people who are in the HKSAR, regardless of their nationality, including people who visit or transit through Hong Kong. The possible effects of Article 23 are chilling in that its violation may result in as much as a life term in prison.

Under the Article 23 legislative proposals, police powers would also be expanded, enabling officers to enter and search residential buildings, confiscate materials, and make arrests at any time without a search warrant. Such practices would not differ from the random searches practiced in Mainland China. The human and civil rights community is outraged by these proposals in part because, rather than modernizing existing legislation, the Hong Kong government has created new offenses such as sedition. In addition, the implementation proposals have increased penalties for offenses included in existing legislation, including greatly increased prison sentences and unlimited fines.

### *The Legal Bases for Criticizing Proposals to Implement Article 23*

Condemnations of the proposals for the implementation of Article 23 are based on a few key instruments, most notably the Joint Declaration and the ICCPR. For example, Article 3(5) of the Joint Declaration provides that HKSAR law ensures rights and freedoms including, *inter alia*, those of the person, speech, press, and association. A fundamental critique of Article 23, therefore, is that its provisions are in breach of the Joint Declaration because they apply legal concepts from mainland China that are incompatible with the rights and freedoms Hong Kong guarantees in Article 3(5).

These provisions also violate Article 39 of the Basic Law which stipulates that restrictions placed on the rights and freedoms enjoyed by Hong Kong residents must not contravene the ICCPR, the ICESCR, and international labor conventions as applied to Hong Kong. Article 23 also requires that the HKSAR prohibit, among other matters, “subversion against the Central People’s Government.” Such a prohibition, however, would be contrary to ICCPR articles relating to freedom of expression (Article 19) and association (Article 21). Further, prohibition against subversion would contravene Article XIII of Annex 1 to the Joint Declaration, which states that the HKSAR will protect the rights and freedoms of inhabitants and other persons within the region, and that the ICCPR and the ICESCR shall remain in force. Finally, the proposals also run counter to the spirit of safeguarding fundamental rights and freedoms as upheld in Hong Kong’s Bill of Rights.

### **The HKSAR Government’s “Concessions” and “Clarifications”**

Although the Hong Kong authorities do not admit that some of the provisions first found in the Consultation Document have been diluted, this has occurred as a result of public pressure. On January 28, 2003, approximately one month after the end of the three-month consultation period, HKSAR Chief Executive Tung Chee-hwa discussed the outcome of the consultation exercise and assured the public that after an extensive analysis and examination of the views expressed during the period the Executive Council, Hong Kong’s cabinet, had clarified certain legislative proposals and delineated clear directions for the drafting work to begin. The government plans to pass the legislation by July 2003. Despite Tung’s confidence that the rights and freedoms of Hong Kong’s people will remain fully protected after the enactment of laws promulgating Article 23, widespread reservations continue to haunt a broad spectrum of organizations in the HKSAR. In response to opinions expressed during the consultation period, the government has decided to exempt foreign nationals from prosecution for treason, for example, and has also abolished the offense of seditious publication. In an attempt to safeguard freedom of the press and the free flow of information, the government has also limited the definition of “unauthorized access” to protected information, restricting it to access through criminal means such as hacking, theft, or bribery. In a January 28, 2003 press release outlining changes to the Consultation Document, Secretary for Security Ip said that more precise definitions and clearer concepts have been included in the implementation proposals. For example, the government restricted the definition of the crime of “levying war” under the offense of treason from “a riot or insurrection involving a considerable number of people for some general public purpose” to actual war or armed

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conflict. Further, the government abolished the offense of misprision of treason, committed when a person knows that another person has committed treason but fails to disclose this information to the proper authority within a reasonable amount of time. In its list of concessions, the government also provided a clearer definition of a new class of protected information originally entitled “relations between the Central Authorities . . . and the HKSAR.” The new definition is confined to information on matters concerning the HKSAR that are within the responsibility of the Beijing Central Authorities under the Basic Law. Moreover, disclosure of such information would constitute an offense only if it is damaging to the interests of national security. Although the Article 23 clarifications released in late January were welcomed in Hong Kong business circles, pro-democracy legislators and human rights activists dismissed the changes as minimal and maintained that the proposed law, despite its changes, would ultimately violate the “One Country, Two Systems” principle upon which the 1997 handover of sovereignty was based by outlawing local groups linked to organizations banned in mainland China. Law Yu Kai, director of HKHRM, criticized the concessions as minor, citing the proposals as still insisting on the protection of national interest “as a pretext to protect one-party rule in China.”

### Introduction of the Draft Bill to Hong Kong’s Legislative Council

Although a blue paper containing the draft legislation was issued to Hong Kong’s legislature on February 26, 2003, this process excluded members of the public from voicing their concerns. Prior to the bill’s introduction, leading democratic politicians, lawyers, the Hong Kong Bar Association, and newspaper editorials had all called for the government to publish a white paper setting out the actual drafting of the new legislation, including legal definitions. The government consistently rejected this proposal. In response to the bill’s introduction, Hong Kong’s Democratic Party is pushing for withdrawal on the ground that it lacks public support. The limits of public pressure are evident in the continued inclusion of certain provisions in the proposed legislation. For example, the original proposal to ban organizations based on a link with the Chinese mainland on security grounds is more tightly defined and subject to review by the courts, a check previously missing. Albeit in a modified form, the legislation still allows the Chinese authorities to use Beijing’s directives to ban an organization on the Mainland as the basis for banning affiliated bodies in Hong Kong—without providing reasons for so doing. The government of the HKSAR posits the fact that a decision to impose a ban can be challenged in the courts as a limiting test on the legislation’s power. However, the text of the law shows that “the Court may order that all or any portion of the public shall be excluded during any part of the hearing,” thereby allowing secret court trials. Further, the text states that a hearing can “take place without the appellant being given full particulars of the reasons for the proscription” and that the Court can “hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him.” This manipulated access to the court system undermines any sort of balance of the power of proscription that a right to a court hearing could have provided. The HKSAR government also “points to various tests that would have to be met before a ban could be imposed, such as

being satisfied that it is necessary for national security.” It does not seem difficult for government officials to convince themselves that the appropriate standards for banning an organization have been met; judiciaries everywhere are reluctant to question governments on national security matters.

### Conclusion

Despite its willingness to modify other unpopular proposals, the Tung administration’s refusal to abandon the subversion law, which would empower the government of the HKSAR to ban local organizations linked to organizations that are outlawed on the mainland, calls into question the government’s claim that it is simply fulfilling its duty to implement Article 23. This particular proposal goes beyond what Article 23 requires, strongly suggesting that Beijing, for the first time since the 1997 handover, will gain power to play a role in which groups are banned in the HKSAR.

Beyond the consultation period and the current legislative work occurring in the HKSAR, the context for this debate is the Basic Law’s appeal for greater democratization, a goal that requires serious attention by the local authorities. Hong Kong has always been known for its rule of law, the independence of its judiciary, the free flow of information, and all of the fundamental freedoms guaranteed under the Basic Law. These freedoms have contributed to Hong Kong’s status in the international community, and its appeal to investors. Implementing the proposed Blue Paper for the implementation of Article 23 would quickly and definitively curtail these freedoms. 🌐

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